



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

MAR 12 2014

IN REPLY: ENF-2-1  
REFER TO: Docket No. R9-10-14

Francisco Vega  
Compliance & Enforcement Supervisor  
Nevada Division of Environmental Protection  
Bureau of Air Pollution Control  
901 South Stewart St. Suite 4001  
Carson City, NV 89701-5249

Dear Mr. Vega:

Enclosed for your information is a copy of a second Notice of Violation and Finding of Violation ("Second NOV") that the U.S. Environmental Protection Agency ("EPA"), Region IX, issued to the Nevada Cement Company ("NCC") for violations of the Clean Air Act ("Act") at NCC's Portland cement plant in Fernley, Nevada (the "Facility").

The purpose of the Second NOV is to notify NCC that EPA finds that it has violated the Prevention of Significant Deterioration and Standards of Performance for New Stationary Sources at the Facility. The violations are set forth more specifically in the enclosed Second NOV. The Second NOV has been issued pursuant to Sections 113(a)(1), 113(a)(3) and 167 of the Act, 42 U.S.C. § 7401-7671q.

Please note, certain information contained in Appendix A of the Second NOV has been claimed as confidential business information by NCC pursuant to 40 C.F.R. Part 2, and therefore the Appendix has not been included with your copy. This Appendix will be protected by EPA accordingly, at least until such time that EPA makes a determination, if any, that the information does not meet the criteria to be considered CBI.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any action will be taken pursuant to Section 113 of the Act.

If you have any questions concerning this Second NOV, please contact Charles Aldred of the Air and TRI Section at (415) 972-3986, or [aldred.charles@epa.gov](mailto:aldred.charles@epa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen H. Johnson".

Kathleen H. Johnson  
Director, Enforcement Division

Enclosure w/o App. A



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

In the Matter of:	)	
	)	
NEVADA CEMENT COMPANY	)	Docket No. R9-10-14
	)	SECOND NOTICE OF
Proceeding under Section 113(a)	)	VIOLATION AND
of the Clean Air Act,	)	FINDING OF
42 U.S.C. ' 9613(a)	)	VIOLATION
	)	

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**SECOND NOTICE OF VIOLATION AND FINDING OF VIOLATION**

This Second Notice of Violation and Finding of Violation ("Second NOV") is issued to the Nevada Cement Company (NCC) for violations of the Clean Air Act (CAA or the "Act"), as amended, 42 U.S.C. §§ 7401-7671q, at its Portland cement manufacturing facility located in Fernley, Nevada (the "Facility"). The United States Environmental Protection Agency (EPA) previously issued an NOV to NCC on October 5, 2010, alleging violations of the Prevention of Significant Deterioration (PSD) and Title V Operating Permit Program requirements pertaining to emissions of nitrogen oxides (NO<sub>x</sub>), Carbon Monoxide (CO), and sulfur dioxides (SO<sub>2</sub>), and also alleging violations of the National Emission Standards for Hazardous Air Pollutants for Portland Cement Manufacturing Facilities. The PSD allegations from this earlier NOV are incorporated by reference and recited herein. This Second NOV also alleges additional violations of PSD pertaining to emissions of NO<sub>x</sub> and Particulate Matter (PM), and violations of the New Source Performance Standards (NSPS) for Portland

Cement Plants, 40 C.F.R. Part 60, Subpart F.

This Second NOV is issued pursuant to Sections 113(a)(1), 113(a)(3) and 167 of the Act. Section 113(a)(1) requires the Administrator of the United States Environment Protection Agency (EPA) to notify any person she finds in violation of an applicable implementation plan or a permit. The federal PSD regulations also clarify that failure to comply with the PSD provisions renders a source subject to enforcement under Section 113 of the Act. See 40 C.F.R. § 52.23. The authority to issue this Second NOV has been delegated to the Regional Administrator of EPA Region IX and further re-delegated to the Director of the Enforcement Division in EPA Region IX.

#### **SUMMARY OF VIOLATIONS**

The Facility is a Portland cement manufacturing plant comprised of a long dry kiln (Kiln #1), a single-stage preheater kiln (Kiln #2), and associated equipment used to produce clinker, including solid fuel handling equipment, two clinker coolers, assorted fans, cement finish mills, and extensive sections of ductwork.

The Facility is located in an area that has at all relevant times been classified as attainment for ozone (O<sub>3</sub>), nitrogen dioxide ("NO<sub>2</sub>"), PM (both for PM<sub>10</sub> and PM<sub>2.5</sub>), and SO<sub>2</sub>. Accordingly, the PSD provisions of Part C, Title I of the Act, apply to the Facility for NO<sub>x</sub>, SO<sub>2</sub> and PM emissions.

NCC made a series of physical and/or operational changes to its Facility from 1987 through 1997. EPA has determined that these changes, which are identified in Appendix A, either individually or in the aggregate, were major modifications for purposes of the PSD program since the Facility significantly increased both actual and potential emissions of NO<sub>x</sub>, SO<sub>2</sub> and PM as a result of them. NCC failed to apply for one or more PSD permits for the modifications covering emissions of these pollutants. NCC's failure to apply for a PSD permit and install and operate additional emission controls meeting best available control technology (BACT) covering the pollutants when it constructed and began operating its Facility after the commencement of the changes identified in Appendix A was, and continues to be, a violation of the PSD requirements of the Act.

In addition, Kiln #2 and the two clinker coolers at the Facility are subject to the Cement NSPS requirements for PM emissions. NCC's modifications of these units, identified by the changes in Items #1-3 in Appendix A, made them "affected facilities" under the Cement NSPS, and subjected them to certain requirements, including performance testing, PM emission limits, monitoring, recordkeeping, and reporting requirements. NCC has failed to comply with one or more of these requirements.

## **STATUTORY & REGULATORY BACKGROUND**

### **National Ambient Air Quality Standards**

1. The Administrator of EPA, pursuant to authority under Section 109 of the Act, 42 U.S.C. § 7409, has promulgated National Ambient Air Quality Standards (NAAQS) for certain criteria pollutants relevant to this Second NOV, including NO<sub>2</sub>, PM<sub>10</sub>, PM<sub>2.5</sub>, SO<sub>2</sub> and O<sub>3</sub>. See 40 C.F.R. §§ 50.4-50.11. NO<sub>x</sub> serves as the regulated pollutant for the NO<sub>2</sub> standard and one of the regulated pollutants for the O<sub>3</sub> standard.

2. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgated lists of attainment status designations for each air quality control region (AQCR) in every state. These lists identify the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Nevada AQCRs are listed at 40 C.F.R. § 81.329.

### **Prevention of Significant Deterioration**

3. Section 110 of the Act, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA a plan that provides for the implementation, maintenance and enforcement of primary and secondary NAAQS in the state. Upon approval by EPA, the plan becomes part of the applicable state implementation plan (SIP) for that state.

4. Section 110(a)(2)(C) of the Act, 42 U.S.C. § 7410(a)(2)(C), requires that each SIP include a PSD permit program as provided for in Part C of Title I of the Act, 42

U.S.C. §§ 7470-7491. Part C sets forth requirements for SIPs for attainment areas to ensure maintenance of the NAAQS.

5. On June 19, 1978, pursuant to Sections 160 through 169 of the Act, 42 U.S.C. §§ 7470-7479, EPA promulgated federal PSD regulations at 40 C.F.R. § 52.21. 43 Fed. Reg. 26,402.

6. The federal PSD program was incorporated into all applicable implementation plans nationwide and contains the applicable PSD program requirements for each plan until EPA approves into an individual SIP a replacement program. See 40 C.F.R. § 52.21(a); 42 U.S.C. § 7410(a)(2)(C).

7. The Nevada Division of Environmental Protection (NDEP) has primary jurisdiction over major stationary sources of air pollution sources in the Northwest Nevada Intrastate AQCR. 40 C.F.R. § 81.115. This area includes the Facility.

8. As NDEP has never applied for nor been granted approval of a PSD program to be included in its SIP, the federal PSD program set forth at 40 C.F.R. § 52.21 contains the applicable PSD permitting program requirements for the Northwest Nevada Intrastate AQCR.

9. Subsequent to 1978, the PSD regulations have been periodically revised. As the changes identified in this Second NOV triggering the PSD requirements occurred from 1987-1997, the 1992 version of the PSD regulations contain the most applicable provisions pertaining to the alleged violations. See 57 Fed. Reg. 32314 (July 21, 1992).

10. 40 C.F.R. § 52.21 (b)(1)(i)(a) (1992) defined a "major stationary source" as any stationary source within one of 28

source categories which emits, or has the potential to emit, 100 tons per year (tpy) or more of any air pollutant subject to regulation under the Act. Portland cement plants are included among the 28 source categories.

11. The PSD Regulations defined a "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 52.21(b)(2)(i) (1992).

12. 40 C.F.R. § 52.21(b)(3)(i) (1992) defined "net emissions increase" as the "amount by which the sum of the following exceeds zero:

a. Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

b. Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and otherwise creditable."

13. 40 C.F.R. § 52.21(b)(21) (1992) provides that "actual emissions . . . shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation." The PSD regulations also provide that "[f]or any emissions unit . . . which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit on that date." 40 C.F.R. § 52.21(b)(21)(IV) (1992).



18. The PSD permitting process required, among other things, that for pollutants emitted in significant amounts, the owner or operation of a major source apply BACT to control emissions, 40 C.F.R. § 52.21(j) (1992); model air quality, 40 C.F.R. § 52.21(l) (1992); and perform a detailed impact analysis regarding both the NAAQS and allowable increments, 40 C.F.R. § 52.21(k) (1992).

19. Any owner or operator of a source or modification subject to 40 C.F.R. § 52.21 who commenced construction of a modification after the effective date of the PSD regulations without applying for and receiving a PSD permit is subject to appropriate enforcement action by EPA. 40 C.F.R. § 52.21(r)(1) (1992); Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477.

#### **New Source Performance Standards**

20. Pursuant to Section 111 of the Act, 42 U.S.C. § 7411, Standards of Performance for New Stationary Sources, the Administrator promulgated the New Source Performance Standards (NSPS) General Provisions, codified at 40 C.F.R. Part 60, Subpart A, and the Standards of Performance for Portland Cement Plants, codified at 40 C.F.R. Part 60, Subpart F ("Cement NSPS").

21. Section 111(e) of the Act, 42 U.S.C. § 7411(e), prohibits the operation of any new source in violation of an

14. 40 C.F.R. § 52.21(b)(4) (1992) defined "potential to emit" as the "maximum capacity of a stationary source to emit a pollutant under its physical or operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including the air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable." As a result, the PSD regulations utilized what has been termed an "actual-to-potential" test to determine whether an emissions increase occurred for purposes of a modification.

15. 40 C.F.R. § 52.21(b)(23)(i) (1992) defined "significant" and states that, in reference to NO<sub>x</sub> and SO<sub>2</sub>, significant net emissions increase means an increase that would equal or exceed 40 tons or more per year, and in reference to PM, significant net emissions increase means an increase that would equal or exceed 25 tons or more per year.

16. An applicant for a PSD permit to modify a stationary source is required to submit all information necessary to allow the permitting authority to perform any analysis or make any determination required in order to issue the appropriate permit. 40 C.F.R. § 52.21(n) (1992).

17. 40 C.F.R. § 52.21(i) (1992) prohibited commencement of actual construction of a major modification to which the PSD requirements apply unless the source had a permit stating that the requirements of 40 C.F.R. §§ 52.21(j)-(r) had been met.

NSPS applicable to that source. Thus, a violation of an NSPS is a violation of Section 111(e) of the Act.

22. The Cement NSPS applies to certain affected facilities at Portland cement plants, including kilns, clinker coolers, raw mill systems, finish mill systems, raw mill dryers, raw material storages, clinker storages, finished product storages, conveyor transfer points, bagging and bulk loading and unloading systems, for which construction, modification, or reconstruction is commenced after August 17, 1971. See 40 C.F.R § 60.60.

23. 40 C.F.R. § 60.14(a) of the NSPS General Provisions provides that, except as provided in 40 C.F.R. § 60.14(e) and (f), " ... any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the [CAA]. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere."

24. Pursuant to 40 C.F.R § 60.14(e), the following shall not, by themselves, be considered modifications under 40 C.F.R Part 60 Subpart A:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category . . . ;.

- (2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility;
- (3) An increase in the hours of operation;
- (4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. . . ;
- (5) The addition or use of any system or device whose primary function is the reduction of air pollutants. . . ; or
- (6) The relocation or change in ownership of an existing facility.

25. The Cement NSPS was originally promulgated on December 23, 1971 (36 Fed. Reg. 24876), but underwent significant revisions on February 12, 2013 (78 Fed. Reg. 10032), including changes to the emission limits and monitoring requirements. Pursuant to the revised Cement NSPS, the requirements of the February 12, 2013 revisions apply to all affected facilities, regardless of when the facility first became subject to the requirements of the Cement NSPS. See 40 C.F.R. § 60.60(b).

26. "Within 60 days after achieving the maximum production rate at which an [NSPS] affected facility will be operated, . . . , the owner or operator of such facility shall conduct performance test(s) and furnish the Administrator a written

report of the results of such performance test(s)." 40 C.F.R § 60.8(a).

27. On and after the date on which the performance test required to be conducted pursuant to 40 C.F.R. § 60.8 is completed, a source may not discharge into the atmosphere from any kiln having undergone a modification any gases which contain PM in excess of 0.07 pound per ton of clinker. 40 C.F.R § 60.62(a)(1)(iii).

28. On and after the date on which the performance test required to be conducted pursuant to 40 C.F.R. § 60.8 is completed, a source may not discharge into the atmosphere from any clinker cooler having undergone a modification any gases which contain PM in excess of 0.07 pound per ton of clinker. 40 C.F.R § 60.62(b)(1)(ii).

29. For any kiln subject to an emission limitation on PM, a source must determine hourly clinker production by (i) installing, calibrating, maintaining and operating a permanent weigh scale system to measure and record weight rates of the amount of clinker produced in tons of mass per hour, within ±5 percent accuracy, or (ii) installing, calibrating, maintaining and operating a permanent weigh scale system to measure and record weight rates of the amount of feed to the kiln in tons of mass per hour, within ±5 percent accuracy. 40 C.F.R. § 60.63(b)(1). The source must also determine, record, and

maintain a record of the accuracy of the system for measuring clinker or feed rates, and record the daily clinker production rates and kiln feed rates. 40 C.F.R. §§ 60.63(b)(2)-(3).

30. For each kiln or clinker cooler subject under the Cement NSPS to a PM emissions limit set forth in 40 C.F.R. § 60.62, a source must demonstrate compliance through an initial performance test using Method 5 or Method 5I at appendix A-3 to part 60. A source must also monitor continuous performance through use of a PM continuous parametric monitoring system (PM CPMS), consistent with the requirements of 40 C.F.R. § 60.63(c). 40 C.F.R. § 60.63(c)(1). With limited exception, the PM CPMS must be operated and collecting data at all times the affected source is operating and meet the requirements of 40 C.F.R. § 60.13(h) when determining the 1-hour averages of emissions data. 40 C.F.R. § 60.63(g).

31. A source subject to the kiln PM emission limit must install, operate, calibrate, and maintain instruments for continuously measuring and recording the stack gas flow rate to allow determination of the pollutant mass emissions rate, consistent with the requirements of 40 C.F.R. §§ 60.63(h)(1)-(10).

32. A source subject to the PM CPMS monitoring requirements must develop, and submit to the permitting authority for approval upon request, a site-specific monitoring

plan that meets the requirements of 40 C.F.R. §§ 60.63

(i)(1)(i)-(iii).

33. Each owner or operator required to install a PM CPMS must submit semiannually (1) reports of excess emissions, pursuant to 40 C.F.R. § 60.65(a), and (2) reports of the malfunction information required to be recorded by 40 C.F.R. § 60.7(b), including the frequency, duration, and cause of any incident resulting in deenergization of any device controlling kiln emissions or in the venting of emissions directly to the atmosphere. 40 C.F.R. § 60.65(b).

#### **FINDINGS OF FACT AND VIOLATION**

34. The Facility is a Portland cement manufacturing facility, which is located in Fernley, Lyon County, Nevada.

35. The Northwest Nevada Intrastate AQCR, which includes Lyon County where the Facility is located, has been designated as attainment/unclassifiable at all times relevant to this Second NOV for NO<sub>2</sub>, PM<sub>10</sub>, PM<sub>2.5</sub>, CO, SO<sub>2</sub> and O<sub>3</sub> pursuant to Sections 107(d)(1)(C) and 186(a) of the Act, 42 U.S.C. §§ 7407(d)(1)(C) and 7486(a). See 56 Fed. Reg. 56694 (Nov. 6, 1991); 40 C.F.R. § 81.329.

36. NCC is a corporation incorporated in the State of Nevada with its principle place of business at Exit 46 at Interstate 80, Fernley, Nevada, and hence is a "person," as that term is defined in Section 302(e) of the CAA, 42 U.S.C.

§ 7602(e).

37. At all times relevant to this Second NOV, NCC owned and operated the Facility.

38. The Facility includes a long dry kiln (Kiln #1), a single-stage preheater kiln (Kiln #2), and associated equipment used to produce clinker, including solid fuel handling equipment, two clinker coolers, various fans, raw mill systems, cement finish mills, and extensive sections of ductwork.

39. The combustion of coal, petroleum coke, and natural gas at the kilns at the Facility produces emissions of NO<sub>x</sub>, SO<sub>2</sub> and PM and, among other pollutants, which are released to the atmosphere from the Facility.

40. Between 1987 and 1997, NCC commenced construction of various physical and/or operational changes to the Facility, and has continued to operate the Facility with these changes. As the underlying documents identifying these changes have been claimed as confidential business information (CBI) by NCC, the changes are identified in Appendix A, which will be protected by EPA as CBI pursuant to 40 C.F.R. Part 2, at least until such time that EPA makes a determination that the information is not CBI.

41. NCC intended that these changes, either individually or in the aggregate, would increase clinker production at the Facility.



42. These changes, either individually or in the aggregate, resulted in an increase in clinker production at the Facility.

#### **Prevention of Significant Deterioration**

43. Each of the changes identified in Appendix A caused, either individually or in the aggregate, a "net emissions increase" from the Facility of greater than 40 tpy year of NO<sub>x</sub> and SO<sub>2</sub> and greater than 25 tpy of PM.

44. As a result, each of the changes identified in Appendix A constituted, either individually or in the aggregate, a "major modification" to the Facility for PSD purposes, as defined by 40 C.F.R. § 52.21 (b) (2) (i).

45. NCC did not apply for a PSD Permit covering NO<sub>x</sub>, SO<sub>2</sub> or PM emissions for any of the changes identified in Appendix A.

46. NCC failed to install and operate BACT-level emission controls for NO<sub>x</sub>, SO<sub>2</sub> or PM or emissions from the Facility, either at the time that each of the changes identified in Appendix A were commenced or any time since their completion and operation.

#### **Cement NSPS**

47. Certain physical changes performed at the Facility in 1987 through 1993 relating to Kiln #2 and both clinker coolers, which are those changes identified as Items #1-3 in Appendix A, resulted in an increase in the emission rate to the atmosphere

in terms of lbs/hr of PM, a pollutant regulated by the Cement NSPS.

48. As a result of these physical changes, Kiln #2 and the clinker coolers became "affected facilities" under the Cement NSPS, as they were "modified" after August 17, 1971 within the meaning of 40 C.F.R. § 60.14 and Section 111(a)(4) of the CAA, 42 U.S.C. § 7411(a)(4).

49. None of the exceptions to a modification within the meaning of Section 111 of the Act, as described in 40 C.F.R. § 60.14(e), apply to the changes identified as Items #1-3 in Appendix A.

50. NCC was subject to the requirements of the February 12, 2013 revised Cement NSPS immediately upon final promulgation of the rule, and therefore should have performed the initial performance test within sixty days from that date, or by April 13, 2013. Consequently, the revised Cement NSPS emissions limits and monitoring, recordkeeping and reporting requirements also became effective at least by April 13, 2013, the date that the initial performance test should have been performed.

51. Since at least April 13, 2013, and on a continuous basis thereafter, NCC has failed to comply with one or more of the following Cement NSPS requirements:

A. Performance of the initial performance test within 60 days after achieving the maximum production rate at

which an [NSPS] affected facility will be operated, or by April 13, 2013, and furnishing the EPA with a written report of the results of the test, pursuant to 40 C.F.R § 60.8(a);

B. Compliance with the 0.07 lb of PM/ton of clinker emission limit for kilns and clinker coolers pursuant to 40 C.F.R §§ 60.62(a)(1)(iii) and (b)(1)(ii);

C. Monitoring requirements for clinker production, including (i) installing, calibrating, maintaining and operating a permanent weigh scale system to measure and record weight rates of the amount of clinker or feed; (ii) determining, recording, and maintaining a record of the accuracy of the system for measuring clinker or feed rates; and (iii) recording the daily clinker production rates and kiln feed rates, pursuant to 40 C.F.R. §§ 60.63(b)(1)-(3);

D. PM CPMS monitoring requirements for PM emissions, consistent with 40 C.F.R. §§ 60.63(c), (g) and (h);

E. Development, and submittal to the permitting authority for approval upon request, of a site-specific monitoring plan meeting the specifications of 40 C.F.R. §§ 60.63(i)(1)(i) -(iii); and

F. Submittal semiannually of (1) reports of excess emissions, pursuant to 40 C.F.R. §§ 60.65(a), and (2) reports of the malfunction information required to be recorded by 40 C.F.R. § 60.7(b), pursuant to 40 C.F.R. § 60.65(b).

## **NOTICE OF VIOLATION**

### **Prevention of Significant Deterioration**

52. Pursuant to Section 113(a)(1) of the Act, notice is hereby given to NCC that the Administrator of the EPA, by authority duly delegated to the undersigned, finds that NCC is in violation of federal PSD requirements at the Facility described in this Second NOV.

### **Cement NSPS Requirements**

53. Notice is also given to NCC that it has failed to comply with one or more of the Cement NSPS requirements, and therefore is in violation of Section 111 of the Act.

## **ENFORCEMENT**

54. For any violation of a SIP, such as for PSD violations contained in this Second NOV, Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that at any time after the expiration of 30 days following the date of the issuance of a notice of violation, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the SIP, issue an administrative penalty order, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$32,500 per day for each violation that occurs after March 14, 2004 and not more than \$37,500 per day for each violation that occurs after January 12, 2009. 42 U.S.C. § 7413(a)(1); Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended; 40 C.F.R. Part 19.

55. Sections 113(a)(3) and 167 of the Act, 42 U.S.C.

§§ 7413(a)(3) and 7477, provide additional authority for EPA to enforce against violators of the Act.

56. Section 113(c) of the Act, 42 U.S.C. § 7413(c), provides for criminal penalties, imprisonment, or both for persons who knowingly violate any federal regulation or permit requirement. For violations of the SIP, a criminal action can be brought 30 days after the date of issuance of a Notice of Violation.

57. Section 306 of the Act, 42 U.S.C. § 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in NCC and/or the Facility being declared ineligible for participation in any federal contract, grant, or loan.

#### **PENALTY ASSESSMENT CRITERIA**

58. Section 113(e)(1) of the Act, 42 U.S.C. § 9613(e)(1), states that the Administrator or the court shall determine the amount of a penalty to be assessed by taking into consideration such factors as justice may require, including the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violations, the economic benefit of

noncompliance, and the seriousness of the violation.

59. Section 113(e)(2) of the Act, 42 U.S.C. § 9613(e)(2), allows the Administrator or the court to assess a penalty for each day of violation. This section further provides that for purposes of determining the number of days of violation, where EPA makes a *prima facie* showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of an NOV, the days of violation shall be presumed to include the date of the NOV and each and every day thereafter until the facility establishes that continuous compliance has been achieved, except to the extent that the facility can prove by the preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

60. EPA reserves the right to amend this Second NOV or issue a new NOV based on additional information obtained through Section 114 of the Act or any other source available to the Administrator at any point.

#### **OPPORTUNITY FOR CONFERENCE**


61. NCC may confer with EPA regarding this Second NOV if it so requests. A conference would enable NCC to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. If NCC seeks such a conference, it may choose to be represented by counsel. If NCC wishes to confer with EPA, it must make a request for a conference within 10 working days of receipt of this Second NOV. Any request for

a conference or other inquiries concerning the NOV should be made in writing to:

Ivan Lieben  
Office of Regional Counsel  
U.S. EPA (ORC-2)  
75 Hawthorne Street  
San Francisco, CA 94105

(415) 972-3914

Dated: 3/12/14

  
\_\_\_\_\_  
Kathleen H. Johnson  
Director, Enforcement Division

